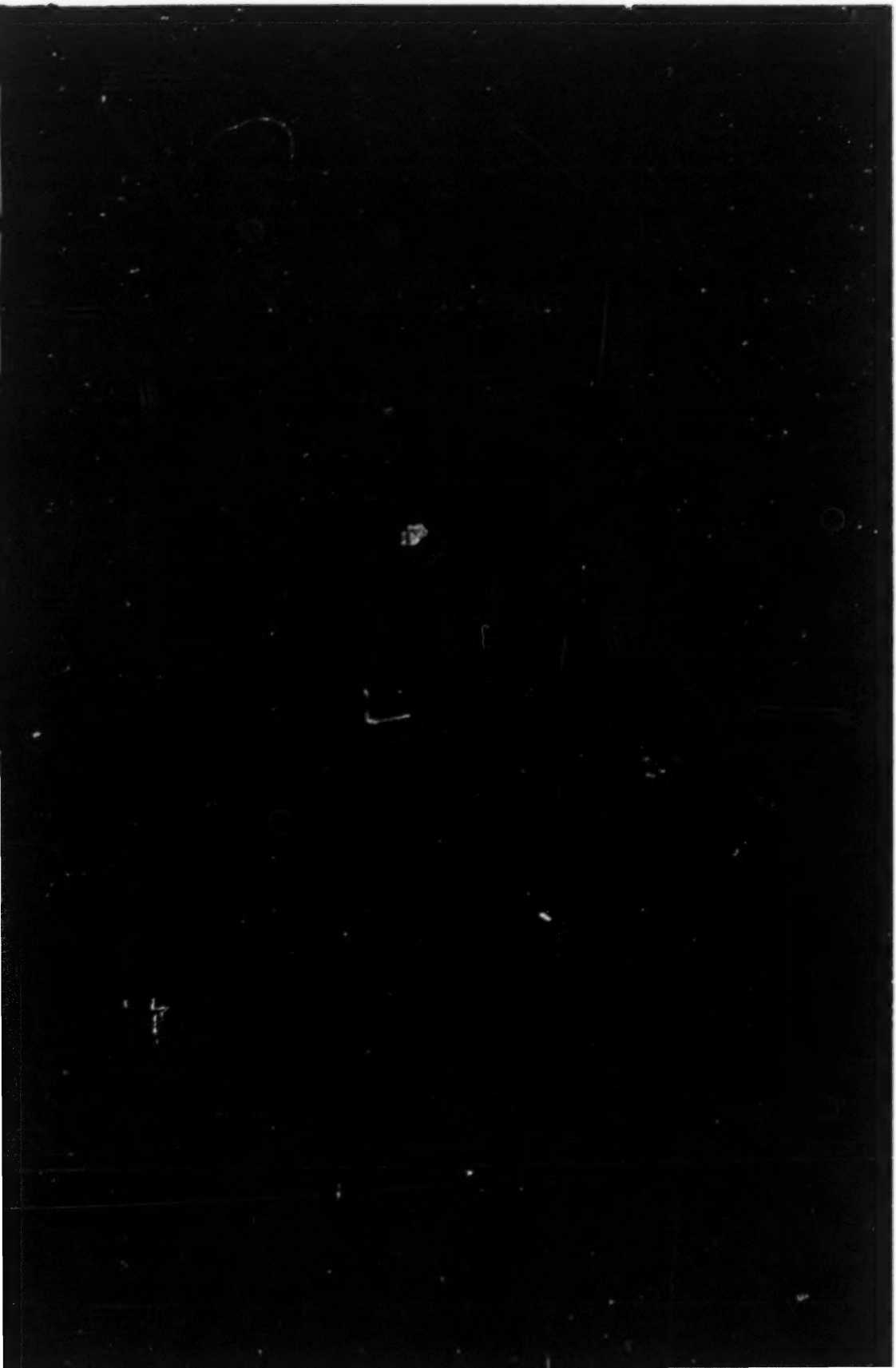

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 416

UNITED STATES OF AMERICA, PETITIONER

v.

BERTELSEN & PETERSEN ENGINEERING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit, entered in the above entitled cause on July 13, 1938, affirming the judgment of the District Court, limited, however, to the question of the jurisdiction of the District Court.

OPINIONS BELOW

The opinions of the District Court (O. R. 40–45; R. 16–23) [1] are reported in 49 F. (2d) 395 and 14 F.

[1] This case was twice tried and twice appealed. There are two separate records. The record on the first appeal, designated in this Court as Volume I, was received in evidence on the second trial and marked petitioner's Exhibit 1 (R. 24). All references to that original record will be designated "O. R."; otherwise all record references herein will be to the second record.

Supp. 868. The opinions of the Circuit Court of Appeals (R. 4–9; 65–68; 75–78) are reported at 60 F. (2d) 745, 95 F. (2d) 867, and 98 F. (2d) 132.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 13, 1938 (R. 78). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the District Court has jurisdiction of a suit against the United States for the year 1917 seeking the recovery of internal revenue taxes in excess of $10,000 where the amount sought to be recovered constitutes a portion of the amount allowed by the Commissioner on a special assessment claim for 1917 which was credited against a barred deficiency for 1918 and where the claim for refund upon which jurisdiction is asserted was filed more than four years after the payment of the 1917 tax.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes and other authorities involved will be found in the Appendix, *infra*, pp. 12–23.

STATEMENT

The following facts material to the question of jurisdiction are alleged in the petition (O. R. 1–3,

7–8) and admitted by answer (O. R. 3, 4–8–9) or are elsewhere in the records:

Respondent, a Massachusetts corporation, filed income and profits tax returns for 1917 and 1918 (O. R. 2–3) and paid taxes for those years in or prior to October 1920 (O. R. 3, 13).

Respondent requested a special assessment of its taxes for those years (O. R. 32–33, 37; R. 44, 52, 57–58). The request was granted, and the Commissioner determined an overassessment for 1917 of $91,570.34 and a deficiency for 1918 of $34,555.68 (O. R. 32–33). The Commissioner notified respondent (O. R. 30–31, 35; R. 56–59), assessed the 1918 deficiency on July 3, 1926 (O. R. 25), and issued a certificate of overassessment for 1917 in July 1926 (O. R. 23).

On July 27, 1926, the Commissioner sent the schedule of overassessments to the Collector for action. The Collector signed and returned the schedule to the Commissioner, certifying the application of $34,555.68 as a credit against 1918 taxes, and further certifying that $52,304.02 was the net amount refundable for 1917. On October 11, 1926, the Commissioner signed the schedule of refunds and credits (O. R. 51).

On November 28, 1927, the taxpayer filed refund claims for 1917 and 1918 in the amount of $34,555.68 (O. R. 2). A copy of the 1918 claim is in the record (R. 38), but the 1917 claim is not. The brief which accompanied the claim (R. 39–49) and which is

referred to in the 1918 claim, discloses that the claims are grounded on the contention that the additional assessment for 1918 was made after the running of the statute of limitations (R. 45–46).

These claims were rejected in January and February, 1928 (O. R. 2), and the action was commenced September 19, 1929 (O. R. 1).

On the first trial, respondent received a judgment n the sum of $44.07 (O. R. 12; 49 F. (2d) 395). Respondent appealed to the Circuit Court of Appeals for the First Circuit, which vacated the judgment and remanded the case to the District Court for further proceeding (R. 4–9; 60 F. (2d) 745). On the second trial, the District Court entered judgment for respondent for $34,555.68, plus interest (R. 15; 14 F. Supp. 868). The judgment was affirmed upon an appeal by the Government (R. 68; 95 F. (2d) 867). Upon rehearing, the judgment was reaffirmed (R. 78; 98 F. (2d) 132).

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in holding that the District Court has jurisdiction to entertain this suit.

2. The court below erred in not directing dismissal of the cause for lack of jurisdiction.

REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals for the First Circuit in the instant case has decided, *inter alia*, an important question relating to the jurisdiction of the

District Courts in a way clearly inconsistent with the applicable decisions of this Court. The present petition is limited to the question of jurisdiction—a question on which the law should be settled and clarified by this Court.

The Commissioner of Internal Revenue applied an amount in excess of $10,000, an overpayment of respondent's taxes for 1917, against a deficiency in its taxes for 1918 which was then barred by the statute of limitations.[1] Respondent's original petition in the District Court (O. R. 1–3) sought recovery, alternatively, for either 1917 or 1918. There can be no doubt, however, that no action can be maintained in the District Court to recover taxes for 1918, the year to which the overpayment was applied. That application was made by the Commissioner, and in *Lowe Bros. Co.* v. *United States*, 304 U. S. 302, this Court specifically held that since under those circumstances no suit could be maintained against a Collector, no suit could be maintained against the United States in the District Courts under Section 24 (20) of the Judicial Code, as amended, *infra*, p. 12. The court below apparently agreed (R. 78) that with respect to 1918 the *Lowe Bros. Co.* case was controlling.

[1] The Government also contended in the lower court that the 1918 deficiency was not barred. The decision was against the Government, and no review of that question is now sought.

It did, however, sustain the jurisdiction of the District Court with respect to the action to recover an overpayment of taxes for the year 1917. The theory upon which the jurisdiction was sustained is, we believe, demonstrably erroneous and in plain conflict with applicable decisions of this Court. We shall first state the objections to the analysis of the court below, and then state what we believe to be the proper analysis, under which the District Court was likewise plainly without jurisdiction.

The opinion below on rehearing states that the court is sustaining the contention of respondent that (R. 77–78)—

> the filing of the second claim for refund on November 28, 1927, and its consideration on its merits was a reopening of the original claim of refund which had been timely filed under Sec. 3226 R. S. * * *; that the Commissioner accepted the claim as such without any objection as to its timeliness or form and considered it on its merits and officially denied it on February 28, 1938 [1928], and the suit of the taxpayer was filed within two years, or on September 19, 1929.

The court below, in other words, predicated the action upon the 1927 claim for refund, treating that claim as a renewal of the "original claim" which the court below held to have been disallowed as to the portion of the 1917 overpayment credited against the 1918 deficiency.

The claim alleged to have been filed in 1927 for the refund of the 1917 taxes is not in the record, nor do the facts stated therein show that it was in any true sense an amendment to the original claim. Respondent, consequently, even fails to show that it has complied with Section 284 (b) (1) of the Revenue Act of 1926, requiring the filing of claims within four years after the payment of the tax. Cf. *United States* v. *Chicago Golf Club*, 84 F. (2d) 914 (C. C. A. 7th); *Rock Island, &c., R. R.* v. *United States*, 254 U. S. 141, 142–143.

That being so, it is immaterial that suit was commenced within two years after denial of the so-called renewal claim. But we need not rest there. A further fatal objection to the approach taken by the court below lies in the fact, overlooked by that court, that the overassessment for 1917 results from a special assessment pursuant to Sections 210 and 328 of the Revenue Acts of 1917 and 1918 (O. R. 32, 37; R. 44, 52, 57–58). No action in any court could, therefore, have been predicated upon the rejection of the original claim. *Welch* v. *Obispo Oil Co.*, 301 U. S. 190; *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502; *Williamsport Co.* v. *United States*, 277 U. S. 551. Consequently, if it be true that the 1927 claim for refund was a "reopening" of the original claim, the essence of the 1927 claim would be for special assessment relief. Since jurisdiction could not have been predicated upon rejection of the

original claim, it can not now be predicated upon rejection of a proper amendment of the original claim, which would necessarily have to be on the same grounds, and this is true whether or not the claim was considered on its merits.

Nor can respondent sustain jurisdiction if the so-called renewal claim were based upon different grounds than those specified in the original claim. Apart from the wholly hypothetical basis upon which such a claim of jurisdiction is founded, it is plain that a renewal claim upon different grounds would be ineffective. In *United States* v. *Garbutt Oil Co.*, 302 U. S. 528, and *United States* v. *Andrews*, 302 U. S. 517, this Court held that claims for refund based upon specific grounds may not properly be amended after the running of the statute of limitations to include new and different grounds. Nor is the result changed where the Commissioner passes upon the amended claim on the merits, since he has no power to waive the statute of limitations. *United States* v. *Garbutt Oil Co.*, *supra*, at p. 534.

For these reasons, therefore, we believe that it is impossible to support the jurisdiction of the District Court on the basis adopted by the court below. A proper analysis, we submit, also reveals that the District Court was plainly without jurisdiction.

Correctly viewed, the action of the Commissioner in crediting a part of the allowed overpayment for 1917 against the barred deficiency for 1918 constituted a collection of the tax for the latter year which

might be recovered by a suit against the United States in the Court of Claims. Cf. *Lowe Bros. Co.* v. *United States*, 304 U. S. 302. This is the clear implication of the decision in *United States* v. *John Gallagher Co.*, 83 F. (2d) 368 (C. C. A. 6th). See also, *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 424.

This being so, no action could be maintained against the Collector for the year 1917, the year of overpayment, and, therefore, no action can be maintained in the District Court against the United States under Section 24 (20). The action by the Commissioner allowing the overpayment for that year has granted to the taxpayer, as to that year, everything that he demands. As the instant case clearly shows, the question in issue in a suit against the Collector for the year of overpayment would be, in reality, the question of the liability of the taxpayer for the year of the deficiency. Respondent here raises no questions with respect to the year 1917; the only real question raised by respondent herein was whether the tax for 1918 was barred by the statute.

The point is made clearer by considering the results of a contrary view. Such a view would mean that a taxpayer could bring an action for the year of overpayment, and in that action litigate the merits of any other year to which an application of the overpayment had been made by the Commissioner, without any claim ever having been filed for the later years, contrary to the express requirements of R. S.,

Section 3226. The holding of this Court in *Lowe Bros. Co.* v. *United States, supra,* that a suit for the year of deficiency could not be maintained against the Collector, could be effectively circumvented by the simple device of suing the Collector for the year of overpayment and litigating in that suit the merits of the taxpayer's liability for the year of deficiency. This is precisely the situation in *United States* v. *C. T. Jaffray,* 97 F. (2d) 488 (C. C. A. 8th), in which a petition for certiorari is also being filed on behalf of the United States, and to which this Court is respectfully referred.

Moreover, the decision below is in conflict with a decision of the Circuit Court of Appeals for the Second Circuit. As appears from the record in the instant case, respondent here sought a recovery of taxes for 1917, the year of overpayment, solely upon the alleged failure to refund an allowed overpayment. Its petition states (O. R. 3) that it is entitled to $34,555.68, the amount of the 1918 deficiency, either as "refund now for 1918 illegally paid, or requesting the said same amount for 1917 as never having been fully paid after allowance." This was the position taken by the taxpayer throughout the proceedings below prior to the rehearing; it was the conclusion of the District Court; and, until the opinion on rehearing, it was the conclusion of the court below. In its opinion on rehearing the court below changed its opinion and held that the claim was not to be interpreted as based upon an allowed

overpayment. That decision, we believe, is plainly contradicted by the record. Consequently, the decision below, which allows a recovery against the United States under Section 24 (20) of the Judicial Code in a sum in excess of $10,000 in an action founded solely upon an alleged failure to repay an allowed overpayment, is directly in conflict with the holdings in *Moses* v. *United States*, 61 F. (2d) 791 (C. C. A. 2d), certiorari denied, 289 U. S. 743; cf. *United States* v. *Savings Bank*, 104 U. S. 728, 734.

CONCLUSION

The decision of the court below is erroneous. The jurisdictional questions involved are important and the law with regard thereto should be clarified and settled by this Court. Wherefore, it is respectfully submitted that this petition should be granted.

ROBERT H. JACKSON,
Solicitor General.

OCTOBER 1938.

APPENDIX

Judicial Code, as amended:

> SEC. 24. The district courts shall have original jurisdiction as follows:
>
> * * * * *
>
> Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, * * * and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury. (U. S. C., Title 28, Sec. 41.)

Revenue Act of October 3, 1917, c. 63, 40 Stat. 300:

> SEC. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the

net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.

For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used.

Revenue Act of 1918, c. 18, 40 Stat. 1057:

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several

classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with interest at the rate of ½ of 1 per centum per month on such excess from the time the installment was due.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in

the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the Revenue Act of 1917, * * * or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) * * *

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

* * * * *

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of

any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, * * *. No such suit or proceeding shall be begun * * * after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

* * * * *

(U. S. C., Title 26, Sec. 1672.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C., Title 26, Sec. 1670.)

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U. S. C., Title 26, Sec. 1674.)

SEC. 609. ERRONEOUS CREDITS.

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607. (U. S. C., Title 26, Sec. 1675.)

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608. (U. S. C., Title 26, Sec. 1675.)

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

(a) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) refund of which is erroneously made, within the meaning of section 608, after the enactment of this Act, may be recovered by suit brought in the name of the United States, but only if such suit is begun

within two years after the making of such refund.

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U. S. C., Title 26, Sec. 1646.)

H. Rep. No. 2, 70th Cong., 1st Sess., pp. 33–34:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES

Section 1106 (a) of the 1926 Act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitations prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 Act is repealed as of its effective date and is replaced by sections 607, 608, 609, and 610 of this bill.

Section 607 of the bill prescribes the effect to be given to the expiration of a period of limitations against the United States and section 608 relates to the effect of the expiration of limitations periods against the taxpayer.

Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made after the period of limitation on assessment (no assessment having been made within such period) or after the expiration of the period of limitation on collection by distraint or court proceedings

(no distraint or court proceeding having been begun within such period). An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this Act. Any such overpayment shall be credited or refunded, however, only if claim therefor is filed within the proper period of limitation.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also, neither section applies to cases which have been closed by a final agreement under section 1106 (b) of the 1926 Act or section 606 of the new Bill.

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATIONS AGAINST THE TAXPAYER.

If a refund is made after the expiration of the period for filing claim (claim not having been filed within the period) or after the rejection, after the date of the enactment of this Act, of a claim filed within the proper period and if the period for filing suit has expired (no suit having been filed within the period), the refund thus made shall be considered as erroneous and is recoverable by the United States as provided in section 610.

SEC. 609. ERRONEOUS CREDITS.

Section 609 provides that a credit of an overpayment against a barred deficiency or a credit of a barred overpayment against a deficiency which is not barred, shall be void if

payment of the deficiency in the first case or the making of a refund in the second would constitute an overpayment or an erroneous refund under section 607 or 608. In other words, the credit is void if either the deficiency or the overpayment is barred.

Section 609 applies to any credit made before or after the enactment of this Act.

S. Rep. No. 960, 70th Cong., 1st Sess., pp. 41–42:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Section 1106 (a) of the 1926 act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitation prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 act is repealed as of its effective date and is replaced by sections 607, 608, 609, and 610 of this bill.

Section 607 of the bill prescribes the effect to be given to the expiration of a period of limitation against the United States and section 608 relates to the effect of the expiration of a period of limitation against the taxpayer.

Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made pursuant to an assessment after the expiration of the period of limitation on assessment (no assessment having been made within such period) or after the expiration of the period of limitation on collection by distraint or court proceedings (no distraint or court proceeding having been begun within such period). It is immaterial whether the payment was voluntary or involuntary, and duress is also of no significance

in determining the right to recover an amount paid after the statute has run. An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this act. Any such overpayment shall be credited or refunded, however, only if claim therefor is filed within the proper period of limitation.

The section has been rewritten by a committee amendment in somewhat simpler language.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also, neither section applies to cases which have been closed by a final agreement under section 1106 (b) of the 1926 act or section 606 of the new bill.

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST THE TAXPAYER.

If a refund is made after the expiration of the period for filing claim (claim not having been filed within the period) or after the rejection, after the date of the enactment of this act, of a claim filed within the proper period, and if the period for filing suit has expired (no suit having been filed within the period), the refund thus made shall be considered as erroneous and is recoverable by the United States as provided in section 610.

It seems desirable to provide some means whereby, in connection with questions of broad application to a great number of cases, one test suit may be brought and all the other

cases involving the same point may be held in abeyance until the test suit is decided. Accordingly, the committee proposes to amend the House bill by inserting in section 608 a provision to the effect that in cases of the kind described the commissioner and the taxpayer may execute an agreement suspending the running of the statute of limitations for filing suit until final decision in the test case or cases named in the agreement. This amendment will prevent a multiplicity of suits without disturbing in any way the desirable policy embodied in the provisions of the House bill. It will be noted that the agreement is not that the parties thereto shall be bound by the test case in the settlement of the tax liability.

SEC. 609. ERRONEOUS CREDITS.

Section 609 provides that a credit of an overpayment against a barred deficiency or a credit of a barred overpayment against a deficiency which is not barred shall be void if payment of the deficiency in the first case or the making of a refund in the second would constitute an overpayment or an erroneous refund under section 607 or 608.

Section 609 applies to any credit made before or after the enactment of this act.

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